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SDB Damansara Sdn Bhd v Datuk Bandar Kuala Lumpur (No 1)

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R2–25–499 OF 2010
ROHANA YUSUF J
31 JANUARY 2011

Civil Procedure — Rules of court — Non-compliance — Application for judicial review — Leave for application not obtained — O 53 of the Rules of the High Court 1980 ('RHC') — Whether failure to obtain leave denied court of jurisdiction to hear application — Whether O 1A or O2 r 1 of the RHC could cure defect arising from non-compliance — Whether inordinate delay in applying for mandamus explained

The applicant applied to the High Court under O 53 of the Rules of the High Court 1980 ('RHC') for a declaration that the respondent's decision to scale down a project for construction of bungalow houses from 21 units to 16 units was ultra vires the Federal Territory (Planning) Act 1982. The applicant sought an order of certiorari to quash that decision, an order of mandamus directing the respondent to revoke a stop-work order issued on 11 December 2008 and other consequential reliefs and costs. The attorney general's chambers, which was served with the cause papers, said the application should be struck off as prior leave had not been obtained for its filing as required by O 53 r 3 of the RHC; that the application for mandamus was made well beyond the period of 40 days from the date the respondent's decision was made known to the applicant, as stipulated under O 53 r 3(6) of the RHC, and that the applicant was not an aggrieved person. Concerning the objection on leave, the applicant, inter alia, argued that O 53 r 2 of the RHC and Form 111A of the RHC only required reliefs sought to be set out and there was nothing to suggest Form 111A should include a prayer for leave. The applicant submitted that the omission to include a prayer for leave did not cause a miscarriage of justice and urged the court to invoke O 1A of the RHC.

Held, dismissing the application with costs:

(1) An application for judicial review must be preceded with the grant of leave by the court. Without leave, the court had no jurisdiction to hear the application. The requirement for leave was not a mere formality (see paras 6 & 8).

(2) Order 1A of the RHC could not be invoked when a party failed to comply with any provision of the rules lest the whole RHC be rendered

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useless. In a case where leave was a mandatory requirement, neither O 1A nor O 2 r 1 of the RHC could cure the defect arising from non-compliance with O 53 r 3(1). Failure to comply with O 53 r 3(1) could not be regarded as a mere technical non-compliance as it went to the root of the issue, viz the jurisdiction of the court (see para 9).

(3) The stop-work order was made on 11 December 2008 and the applicant was informed of it by a letter of the same date. There was a delay of nearly two years with regard to the application for mandamus. Compliance with time was imperative under O 53 of the RHC. It also went to the very root of the issue, ie the power of the court to hear the application for judicial review (see para 10).

(4) Although O 53 r 3(6) allowed the court to extend time on good reason, the applicant did not make any application for extension of time. Hence, no explanation had been furnished for the long delay (see para 11).

[Bahasa Malaysia summary

Pemohon memohon kepada Mahkamah Tinggi di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk perisytiharan bahawa keputusan responden untuk mengurangkan projek untuk pembinaan rumah-rumah banglo daripada 21 unit kepada 16 unit adalah ultra vires Akta (Perancangan) Wilayah Persekutuan 1982. Pemohon memohon perintah certiorari untuk membatalkan keputusan tersebut, perintah mandamus mengarahkan responden membatalkan perintah berhenti kerja yang dikeluarkan pada 11 Disember 2008 dan relief dan kos penting yang lain. Kamar peguam negara yang mana diserahkan dengan kertas-kertas kausa tersebut, menyatakan permohonan tersebut patut dibatalkan memandangkan kebenaran yang terlebih dahulu tidak diperolehi untuk pemfailannya seperti yang dikehendaki di bawah A 53 k 3 KMT; bahawa permohonan untuk mandamus dibuat melampaui tempoh 40 hari dari tarikh keputusan responden diberitahu kepada pemohon, seperti yang ditetapkan di bawah A 53 k 3(6) KMT, dan bahawa pemohon bukan orang yang terkilan. Berkaitan bantahan atas kebenaran, pemohon, antara lain, berhujah bahawa A 53 k 2 KMT dan Borang 111A KMT hanya memerlukan relief-relief yang dipohon dinyatakan dan tidak terdapat untuk mencadangkan Borang 111A patut memasukkan permohonan untuk kebenaran. Pemohon berhujah bahawa ketinggalan untuk memasukkan permohonan untuk kebenaran tidak menyebabkan ketidakadilan dan mendesak mahkamah untuk membangkitkan A 1A KMT.

Diputuskan, menolak permohonan dengan kos:

(1) Permohonan untuk semakan kehakiman mesti didahului dengan pemberian kebenaran oleh mahkamah. Tanpa kebenaran, mahkamah

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tidak mempunyai bidang kuasa untuk mendengar permohonan tersebut. Keperluan untuk kebenaran bukan formaliti semata-mata (lihat perenggan 6 & 8).

(2) Aturan 1A KMT tidak dapat dibangkitkan apabila pihak gagal untuk memenuhi apa-apa peruntukan kaedah jika tidak keseluruhan KMT akan menjadi tidak berguna. Dalam kes di mana kebenaran adalah keperluan mandatori, tidak A 1A ataupun A 2 k 1 KMT boleh berbangkit daripada ketidakpatuhan dengan A 53 k 3(1). Kegagalan untuk mematuhi dengan A 53 k 3(1) tidak boleh dikaitkan sebagai ketidakpatuhan teknikal semata-mata kerana ia berbalik kepada pokok pangkal isu, viz bidang kuasa mahkamah (lihat perenggan 9).

(3) Perintah berhenti kerja tersebut dibuat pada 11 Disember 2008 dan pemohon telah diberitahu mengenainya melalui surat yang tarikhnya yang sama. Terdapat kelewatan hampir dua tahun berkaitan kepada permohon untuk mandamus. Kepatuhan dengan masa adalah penting di bawah A 53 KMT. Ia juga berbalik kepada pokok pangkal isu, iaitu kuasa mahkamah untuk mendengar permohonan untuk semakan kehakiman (lihat perenggan 10).

(4) Walaupun A 53 k 3(6) membenarkan mahkamah untuk melanjutkan masa atas alasan yang kukuh, pemohon tidak membuat apa-apa permohonan untuk pelanjutan masa. Maka, tiada penjelasan telah dikemukakan untuk kelewatan yang lama tersebut (lihat perenggan 11).]

Notes

For cases on non-compliance, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 6823–6830.

Cases referred to

Abdul Rahman Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor [2008] 6 MLJ 704; [2008] 6 CLJ 805, HC (refd)

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 3 MLJ 145, FC (folld)

Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Bank's Association [1990] 3 MLJ 228; [1990] 1 CLJ 33, SC (refd)

Bandar Utama Development Sdn Bhd v Lembaga Lebuhraya Malaysia & Anor [1998] 1 MLJ 22, HC (refd)

Kejuruteraan Superskill Sdn Bhd Perak v Kesatuan Pekerja-pekerja Alat-alat pengangkutan dan Sekutu [1994] 2 AMR 1316 (refd)

Menteri Besar Negari Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd & Anor [2010] 4 MLJ 360; [2010] 5 CLJ 123, CA (refd)

Pahang South Union Omnibus Co Bhd v Minister of Labour and Manpower & Anor [1981] 2 MLJ 199, FC (refd)

Rohana bt Ariffin v Universiti Sains Malaysia [1988] 2 MLJ 609 (refd)

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Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2006] 5 MLJ 60; [2006] 1 CLJ 927, CA (refd)
Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd [1995] 2 MLJ 442, SC (refd)
Yahya bin Kasim v Government of Malaysia & Anor [1997] 3 MLJ 749, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25(2)
Federal Territory (Planning) Act 1982
Rules of the High Court 1980 O 1A, O 2 r 1, O 53,, O 53 rr 2(1), 3(1), Form 111A

Harpal Singh (BE Teh, Lua Ai Sep and Daphne with him) (Soo Thien Ming & Nasrah) for the applicant.
Haryati Ahmad (Federal Counsel, Attorney General's Chambers) for the respondent.

Rohana Yusuf J:

[1] The applicant (SDB Damansara Sdn Bhd) vide encl1 seeks reliefs from this court as stated in prayers (a)–(e), which essentially prays for, a declaration that the decision by the respondent (Datuk Bandar Kuala Lumpur) to scale down the project for construction of bungalow houses from 21 units to 16 units is ultra vires the Federal Territory (Planning) Act 1982; an order of certiorari to quash that decision; an order of mandamus directing the respondent to revoke a stop work order issued on 11 December 2008; and other consequential reliefs and costs. The application is made pursuant to O 53 of the Rules of the High Court 1980 ('RHC').

[2] The attorney general's chambers having been served with necessary cause papers raised the following objections:

(a) the applicant had not obtained, nor applied for leave in this judicial review application;

(b) the application in relation to prayer (c) is out of time; and

(c) the applicant is not an aggrieved person.

APPLICATION FOR LEAVE

[3] On the first ground of objection, it is clear that the application in encl 1 is made under O 53 of the RHC using the format in Form 111A prescribed by the RHC. Learned federal counsel Cik Haryati Ahmad contended that this application should be struck off because leave had not been obtained by the

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applicant as required under O 53 r 3. She further submitted that under this rule, it is mandatory that leave is had and obtained before an application for judicial review may be made. The application in encl 1, does not contain any prayer for leave and hence no leave was sought or obtained by the applicant before seeking the prayers for a judicial review. She cited the Federal Court decision in *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442 to elucidate the guidelines necessary in an application for leave. In the instant case, the applicant is seeking final reliefs for a declaration, an order for certiorari, and an order of mandamus, which first requires leave to be had and obtained. Thus, leave must be prayed in the Form 111A. The requirement of leave is clearly provided by the O 53 r 3(1) of the RHC. The purpose of obtaining leave according to her is to show the court that at least the applicant has prima facie case to argue.

[4] Learned counsel for the applicant Cik Lua Ai Sep proceeded to argue that the application in encl 1 is in compliant with Form 111A. She argued at length that encl 1 is indeed application for leave, though such prayer is notably omitted. Accordingly, she contended that O 53 r 2 and Form 111A only requires reliefs sought to be set out. She contended that there is nothing to suggest that Form 111A should include a prayer for leave. She argued that even if it is so required, her omission to include such a prayer is not a miscarriage of justice because the attorney general's chambers have been served with the application together with copies of statement as well as affidavit in support. She then urged this court to invoke O 1A of the RHC. Hence, in view of O 1A of the RHC, she contended that the objection raised by the attorney general's chambers has no merits.

[5] Before I proceed to deliberate on the issue of the requirement for leave, it is important to look at what is the nature of the application in encl 1. Learned counsel for the applicant insisted that this application is an application for leave under O 53. It is abundantly clear that, as averred by learned federal counsel, the applicant has jumped the gun, so to speak, in seeking final reliefs in encl 1 before obtaining leave. Even at the hearing of this application learned counsel for the applicant insisted that this application is indeed an application for leave when it is plain and obvious that the prayer for leave is missing. I am therefore unable to understand, let alone appreciate, learned counsel's argument that encl 1 is to be treated as an application for leave. Am I supposed to envision what is clearly not there? Surely, it cannot be the business of the court to indulge in the figment of the applicant's imagination. Instead of insisting on what is not there, in my view, perhaps it would have been better for the applicant to apply for an amendment to insert a prayer for leave. Order 53 provides for the steps to be taken in mounting a challenge against a decision of a public authority. It must strictly be followed. There is also a long line of authorities that offer guidance on how an application for leave should be made

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and considered by the court. A few of such examples are found in the Court of Appeal decision in *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60; [2006] 1 CLJ 927 and the Supreme Court decision in *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Bank's Association* [1990] 3 MLJ 228; [1990] 1 CLJ 33.

[6] There is no doubt that the requirement for leave is absolutely necessary. An application for judicial review must be preceded with the grant of leave by the court. It is indeed a requirement under O 53 r 2(1) of the RHC. The decision of *Kejuruteraan Superskill Sdn Bhd Perak v Kesatuan Pekerja pekerja Alat alat pengangkutan dan Sekutu* [1994] 2 AMR 1316 held that with no application for leave, an applicant has no leg to stand on and would, by that very omission, terminate the application for certiorari. Failure to obtain leave is also said to be fatal because it is a requirement that goes to the jurisdiction of a civil court (see *Rohana bte Ariffin v Universiti Sains Malaysia* [1988] 2 MLJ 609). Without leave, the court has no jurisdiction to hear the application for judicial review because O 53 r 3(1) provides that no application under this order shall be made unless leave thereof has been granted in accordance with this rule. This clearly reflects the imperative nature of the requirements before an application for certiorari, may be made.

[7] Power of the High Court in regard to certiorari is provided for in the Courts of Judicature Act 1964 in para 1 of the Schedule thereto, which sets out the additional powers of the High Court referred to in s 25(2) of the Act. The proviso to s 25 specifically enacts that all such powers of the High Court in the exercise of its jurisdiction as are referred to therein shall be exercised in accordance with any written law or rules of court relating to the same (see *Pahang South Union Omnibus Co Bhd v Minister of Labour and Manpower & Anor* [1981] 2 MLJ 199 (at p 204)).

[8] The requirement for leave is therefore not a mere formality. As stated in *Bandar Utama Development Sdn Bhd v Lembaga Lebuhraya Malaysia & Anor* [1998] 1 MLJ 22, that the granting of leave is needed to filter cases, which would otherwise proceed for full hearing. Quoting author Clive Lewis on *Judicial Remedies in Public Law* (Litigation Library, Sweet & Maxwell (1992) Visu Sinnadurai J observed that the purpose of requiring leave to be obtained is to prevent waste of judicial time by busybodies with misguided or trivial complaint of administrative error. The aim is also to protect public bodies from the harassment that might arise from the need to delay implementation of a decision.

[9] The decision of the Federal Court in *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 3 MLJ 145 binds this court in that O 1A of the RHC cannot be invoked when a party fails to

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comply with any provision of the rules lest the whole RHC would be rendered useless. In a case where leave is a mandatory requirement, following the above Federal Court's decision, neither O 1A nor O 2 r 1 can cure the defect arising from non-compliance with O 53 r 3(1). The applicant cannot urge this court to invoke O 1A, especially when the applicant had been callous in its disregard for the rules. Failure to comply with O 53 r 3(1) of the RHC cannot be regarded as a mere technical non-compliance as it goes to the root of the issue viz the jurisdiction of this court.

COMPLIANCE WITH TIME

[10] The next objection raised is with respect to the application in prayer (c). Prayer (c) is for an order of mandamus directing the respondent to revoke the stop work order dated 11 December 2008. Learned federal counsel had objected to this application as it was made beyond the period of 40 days from the date the grounds for the application is made available, as stipulated under O 53 r 3(6). The stop work order was made on 11 December 2008. Hence, there was a delay of nearly two years. I have perused through the impugned stop work order. I agree with learned federal counsel the applicant was aware of the decision at least on 11 December 2008. According to the affidavit of Loong Ching Hong in encl 3 in para 13 deposed on behalf of the applicant, the applicant was informed of the stop work order in a letter dated 11 December 2008 ('exh SDB8'). Compliance with time is imperative under O 53. It also go to the very root of the issue, that is, the power of this court to hear an application for judicial review (see *Yahya bin Kasim v Government of Malaysia & Anor* [1997] 3 MLJ 749 and *Abdul Rahman Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor* [2008] 6 MLJ 704; [2008] 6 CLJ 805. The requirement for time compliance under O 53 r 3(6) was again emphasised in the Court of Appeal decision soaking through words of Zaleha Zahari JCA, in *Menteri Besar Negari Pahang Darul Makmur v Seruan Gemilang Makmur Sdn Bhd & Anor* [2010] 4 MLJ 360; [2010] 5 CLJ 123. In that case, it was held that compliance with time requirement prescribed by rule is fundamental as it goes to the jurisdiction of the court, citing the Federal Court case of *Mersing Omnibus Co Sdn Bhd*.

[11] Though O 53 r 3(6) allows the court to extend time on good reason, there is no application for an extension of time made in this application. Hence no explanation been furnished for a long delay. On this ground alone, this application should be struck out.

[12] Having considered the two main issues above, I am satisfied that the

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application in encl 1 is not in compliance with the requirement of O 53 of the RHC. For this reason, I hereby dismiss the application in encl 1 with costs of RM2000 against the applicant.

Application dismissed with costs.

Reported by Ashok Kumar